No. 14527

United States
COURT OF APPEALS
for the Ninth Circuit

WIEL AND AMUNDSEN, A/S,
as claimant of the SS ROMULUS,
Appellant,

vs.

ROY E. POTTER,
Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court of the District of Oregon.

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SUPPLEMENTAL STATEMENT OF THE CASE

Inasmuch as Appellant's Statement of the Case contains certain inaccuracies, libelant finds it necessary to make a brief supplemental statement.

With respect to the hook at the end of the movable rail which pulled loose and caused the libelant to fall backwards to the deck below, there was a small eye at the end of said hook which was covered and plugged with paint at the time of the accident (R. 15, 16, 85, 87,

105). The purpose of this eye was to receive a cotter key, pin, or mousing which, when properly attached, would keep the hook from pulling out of the eye attached to the midships stanchion (Exhibits 1-B, 6-D, R. 44, 45).

When the hook was examined immediately after libelant's fall, it was discovered that it was not secured by a cotter key, pin, or mousing (R. 86) although the purpose of the eye in the hook was to receive a device to hold the rail securely in the stanchion eye (R. 98, 86, 109).

Libelant was injured while sidestepping along the after edge of the forepeak, holding onto the top rail. Appellant suggests (Br. 3) that libelant was negligent in choosing this method of going to see the walking boss, Girt, instead of going over the rail or climbing down from the deck cargo to a narrow space between the aft end of the forepeak and the hatch square—a route considered risky by libelant (R. 77). On the other hand, libelant testified that he had ample footing and did not slip (R. 47) and the route he took appeared safe enough to him (R. 47, 77, 82).

Appellant's Statement of the Case says that there is no evidence that "walking the rail" i.e. walking along the outside of a rail, is usual and it implies that libelant was neggligent in so doing (Appellant's Br. 3). In fact, however, Appellant's own witness, Girt, testified that he had seen men in libelant's position "go all ways" to the forepeak (R. 107) and Girt admitted that he himself had walked the rails during his many years of longshor-

ing (R. 112). He also stated that this was a common practice of longshoremen (R. 113).

Finally, Appellant states (Br. 3) that libelant "exerted a direct upward pull" on the top rail, thus pulling the hook out of the eye. There is no evidence in the record supporting such an assertion.

SUMMARY OF ARGUMENT

There was conflict in the oral testimony as to whether Appellant's vessel was unseaworthy and whether libelant was negligent in putting the rail to an improper use or by choosing an unsafe method of going to talk to the walking boss. The District Court's findings in favor of libelant on these issues were based upon substantial evidence and should not be disturbed by this court.

The SS ROMULUS was unseaworthy at the time of the accident because the guard rail which gave way was not properly secured, and Appellant, as the owner of the ROMULUS was negligent in failing to see to it that the guard rail was secure.

The use to which libelant put the guard rail was usual, proper and prudent, and the injury to libelant was reasonably forseeable.

THE DISTRICT COURT'S FINDINGS SHOULD NOT BE DISTURBED

Appellant rests its case upon the proposition that where the issues of liability are undisputed, the Court of Appeals sitting in admiralty may fully review the findings of the Trial Court. This rule, however, has no application where, as in this case, there is contradictory oral testimony in the record which the Trial Court weighed in reaching its conclusions. So long as there is substantial evidence to support the findings of fact made below, this Court should not upset them.

Petterson v. Alaska SS Co. Inc., 205 F. (2d) 478 (CA 9, 1953), affirmed per curiam 347 U.S. 396, 98 L. Ed. 798, 1954 A.M.C. 860.
Diana Claire-Crescent, 213 F. (2d) 801, 1954 A.M.C. 1164 (CA 9, 1954).
Brett v. J. M. Carras Inc., 203 F. (2d) 451 (CA 3, 1953).
The Mabel, 61 F. (2d) 537 (CA 9, 1932).
The Heranger, 101 F. (2d) 953 (CA 9, 1939).
Krey v. U. S., 123 F. (2d) 1008 (CA 2, 1941).

There was conflicting testimony as to whether the SS ROMULUS was unseaworthy by reason of there being no pin or other device to secure the rail to the stanchion. Appellant attempted to prove that the rail hook fit into the stanchion eye tightly (R. 95, 108) and it contended that the rail was fit for ordinary use because only a vertical, and not a lateral, force would dislodge it, even though it was not secured (R. 106, 107). Finally, Appellant produced evidence which suggested that because the eye in the hook was filled with paint,

it was no longer necessary for a device to be used to secure the hook to the stanchion (R. 100, 105).

On the other hand, libelant's testimony was to the effect that all of the ship's movable equipment should have been secured when not in use (R. 49). There was evidence showing that the eye in the hook was placed there so that the rail could be secured, and that in fact the eye had been so covered over with paint that it was not used for the purpose for which it was designed (R. 85, 86, 98).

There was further conflict in the testimony as to whether libelant was contributorily negligent. There was substantial evidence to prove that the practice of sidestepping on the outside of a guard rail was customary where the situation warranted it (R. 47, 107, 112) and that under the circumstances existing in this case, libelant would not have been injured except for the unsecured rail which gave way while he hung onto it (R. 47). Furthermore, libelant testified that the route he took appeared safe inasmuch as he could not foresee that a section of guard rail would be unsecured (R. 47, 82, 77), and that at least one alternative route, that across the deck near the hatch, seemed risky to him (R. 77).

Appellant cited little evidence to support its contention of contributory negligence, stressing that libelant "chose the more patently dangerous route" (Br. 15) —although the record is devoid of evidence that the route was "patently dangerous", or otherwise dangerous except insofar as Appellant made it so.

Findings of seaworthiness or unseaworthiness are usually findings of fact.

> Mahnich v. Southern SS Co., 321 U.S. 96, 88 L. Ed. 561 (1943).

We think that the trial judge's findings in favor of libelant should be sustained. He heard the oral testimony and was in a position to weigh the credibility, veracity, competancy and sincerity of the witnesses. His conclusions were supported by substantial evidence and therefore under the cases cited herein they should be affirmed.

APPELLANT'S VESSEL WAS UNSEAWORTHY

In *The Osceola,* the Supreme Court announced the doctrine that a vessel and her owner are "liable for injuries received by seamen in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship." (189 U.S. at 175, 23 S. Ct. 487). This doctrine was extended to cover stevedores because they perform the traditional work of seamen.

> Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099 (1946).

Appellant contends that the rail which gave way was seaworthy despite the acknowledged fact that it was not secured to the midship stanchion and the hook-eye which was supposed to be used in so securing the rail was plugged with paint (R. 15, 16). Appellant suggests that because one of its witnesses experimented with the rail and hook *after* the accident and found that

only a "vertical" force could dislodge it, it was fit for its admitted purpose, that is, guarding against seamen or workers being thrown from the forepeak to the deck below.

Such reasoning founders upon two rocks:

First, there is no evidence in the record to show that the hook was firmly seated in the stanchion eye just prior to the accident (R. 111). It is simple mechanics that if the hook were partially out of the eye a lateral force could dislodge it just as in the case of a screen door hook which is only partially through the eye. Then there is the further fact that the manufacturer of the rail, apparently anticipating that the hook might become partially dislodged, with the disastrous consequences which occured in this case, provided an eye in the hook which was intended to receive a cotter key or other such device to prevent the hook from pulling out of the stanchion eye (R. 86, 98). In permitting the use of the rail without a cotter pin, the vessel created a dangerous condition which fine-spun distinctions between "vertical" and "lateral" forces cannot cure.

Second, even if the rail could withstand "lateral" forces but not "vertical" ones it would be unseaworthy, for the purpose of the rail is to permit people to hang onto it to prevent them from falling. Libelant was not notified that the rail was of such delicate design that it would not help him if he exerted "vertical" force when he took hold of it (R. 50). Without such notice, the rail, instead of being a protective device, became a dangerous trap which invited the unwary worker to rely on it for support.

Appellant admits in its brief that the guard rail was "a safety measure to keep men from falling from the forepeak to the main deck below" (Br. 6). This would seem to dispose of Appellant's defense, for obviously the rail failed to keep libelant from falling; indeed when it came loose from the midship stanchion it virtually threw him to the deck (R. 42). Thus the rail did not meet the purpose for which Appellant itself admits it was supposed to be constructed, and the ship was therefore unseaworthy.

APPELLANT WAS NEGLIGENT IN FAILING TO SECURE THE RAIL TO THE MIDSHIP STANCHION

The facts which establish the unseaworthiness of the SS ROMULUS also prove that the vessel's owners were negligent in failing to secure the rail. The rail was designed so that it could be made secure by using a cotter key or mousing to keep the hook from pulling out of the stanchion eye (R. 44, 45). Appellant not only failed to secure the rail but actually painted over the hook-eye so that it could not be used for the purpose for which it was intended (R. 15, 16, 85, 87, 105). No clearer case of improper maintenace could be conceived of, and Appellant should be held liable for the injuries caused thereby.

We again repeat our objection to Appellant's defense that the rail was intended only to protect persons forward of it. There is nothing in evidence to prove this

and common sense indicates that this is a makeshift, sham argument. Presumably if libelant had been on the forepeak forward of the rail, and had fallen because it gave way, Appellant would have argued that the rail was intended to guard only workmen to the aft of it. The plain truth is that the rail was there for people to hold onto and for that purpose it should have been secured. Because it was not, libelant sustained grave injuries.

Appellant raises the further objection however, that it was not negligent because the manner in which libelant was injured could not be foreseen (Br. 12-14). While foreseeability is indeed an element of negligence, this does not require that the exact manner of injury, or the particular accident, be foreseen.

> Storgard v. France etc. SS Corp., 263 F. 545 (CA 2, 1920), cert. denied 252 U.S. 585, 64 L. Ed. 729.

Moreover, the fact that the injury was not anticipated is no defense to a claim for indemnity for an injury caused by the unseaworthiness of a vessel or its appliances.

> The H. A. Scandrett, 87 F. (2d) 708 (CA 2, 1937).
> Stokes v. U. S., 55 F. Supp. 56 (D.C.S.D.N.Y., 1944), modified on other grounds, 144 F. (2d) 82 (CA 2, 1944).

Appellant's liabilty is grounded upon the simple fact that it provided a rail for people to hang onto, and that this rail was not properly maintained so as to be capable of performing its function. It is clearly foreseeable that

where a guard rail is unsecured, someone may get hurt if they rely on it. It does not matter a whit where libelant was when the rail gave way, or what type of force, "vertical" or "lateral", he exerted on it for the rail appeared to be, and should have been, able to provide him with support.

Appellant cites the case of *Pittsburg S.S. Co. v. Palo,* 64 F. (2d) 198 (CA 6, 1933), to support its argument that the manner of libelant's injury must be foreseeable. But the very language quoted by Appellant (Br. 12) states that the test of foreseeability is "the danger of injury" or "some such injury", and not whether the manner of libelant's injury could be foreseen.

To suggest that before a ship can be held liable for negligently permitting a guard rail to be unsecured, the exact manner in which the injured seaman or workman relied on the rail for support must be foreseen is too preposterous to be taken seriously. We repeat: the rail was there to support people and because it was improperly secured it gave way and libelant was injured thereby. Appellant is therefore liable.

LIBELANT WAS FREE FROM CONTRIBUTORY NEGLIGENCE

Appellant seeks to apply to this case the rule that where a seaman knowingly takes an unsafe route to perform his duties in preference to another safe route, and is injured thereby, he is guilty of contributory negligence. Both *Bohannon v. United States,* 92 F. Supp. 700

(D.C.N.Y., 1950) affirmed 185 F. (2d) 678, and *Tampa Interocean S.S. Co. v. Jorgenson,* 93 F. (2d) 927 (CA 5, 1938), cited by Appellant, are cases where the injured party took an unsafe route with full awareness that the particular route was unsafe. In *Bohannon,* libelant had been repeatedly warned to take the catwalk to the forepeak, but instead he proceeded across the well deck in the face of heavy seas breaking onto it. In *Tampa,* it was held that contributory negligence exists only if the seaman knowingly takes an unsafe route.

In the case at bar, the record shows that libelant believed the route he took was safe (R. 47, 82, 77) and that he did not slip from the forepeak (R. 47), but rather, he was thrown from it when the rail gave way. He testified that the rail, being a movable piece of ship's gear, should have been secured (R. 49, 50, 80, 81), and inasmuch as he was not warned (R. 50), libelant was entitled to rely on appearances and the usual practice.

There was evidence in the record from which the trial court could find that libelant's "walking the rail", i.e., sliding along the after edge of the forepeak while hanging on the rail, was a common practice and not negligent (R. 107, 112, 47). As to the alternate routes available to libelant, he testified that one of them, across the deck between the hatch and the forepeak, seemed risky to him (R. 77).

Regardless of whether there were safe routes other than that taken by libelant, he was not negligent unless he was warned of, or knew about, the dangerous condition of the rail which gave way. Libelant could not be

expected to guess that Appellant's rail would not support him because it was not secured. Appellant's assertion that libelant "deliberately chose a potentially dangerous route" (Br. 17) is contradicted by the record and ignores the fact that the lack of a pin or mousing to secure the rail was a partially hidden defect discoverable only upon close inspection (Exh. 6-D). If the route chosen by libelant was unsafe, it was so because of Appellant's negligence which was unknown to libelant until after his fall.

It is settled law in this Circuit that before a libelant can be charged with contributory negligence, he must have created an unreasonable risk of injury to himself.

> Kulukundis v. Strand, 202 F. (2d) 708 (CA 9, 1953).

Certainly under all of the circumstances in this case it cannot be said that libelant created such an unreasonable risk as to justify fastening upon him the onus of contributory negligence. As in the *Kulukundis* case, Appellant here created the unsafe condition which led to libelant's injury and it would not be proper to penalize libelant by requiring of him a higher degree of foresight than is expected of Appellant who has an absolute and non-delegable duty of providing a seaworthy vessel.

> See also: Wong Bar v. Suburban Petroleum Transport, Inc., 119 F. (2d) 745 (CA 2, 1941).

CONCLUSION

Libelant asks that the judgment of the District Court be affirmed because it was based on conflicting oral testimony which the trial court was in the best position to weigh and evaluate. Moreover, the record is clear that the rail which gave way was not properly secured to the stanchion and as a result, it was unable to fulfill the purpose for which it was installed. It was therefore unseaworthy, and the Appellant was negligent and properly held liable by the District Court.

Respectfully submitted,

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